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Supreme Court, U.S.
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No. 01-488

IN THE

Supreme Court of the United States

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TIMOTHY STUART RING,

Petitioner.

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

REPLY BRIEF

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The Petition presents the question of whether the Sixth Amendment right to a jury determination of facts that increase the available range of punishment for criminal defendants subject to a term of *imprisonment* applies as well to defendants subject to the penalty of *death*. The Brief in Opposition concedes that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), "makes clear" that the answer to that question must be "yes." Br. in Opp. at 9. Thus, even the State cannot articulate any justification for maintaining the irrational disjunction between the Sixth Amendment protections available in non-capital cases and those available in capital cases that will persist until this Court overrules *Walton v. Arizona*, 497 U.S. 639 (1990).

The Brief in Opposition does not contest that this case implicates a broadly important and pressing issue as to which this Court's review is warranted. Rather, the State contents itself with arguing that the principles of *Apprendi* do not require that this Court's decision in *Walton* be overruled. We respond to these arguments — which go to the merits of this case, and not to the issue of whether certiorari should be granted — briefly below.

1.a. The Petition argued that *Apprendi* placed the continued viability of *Walton* in grave doubt, that the issue presented is one of broad constitutional importance, that a prompt resolution of this issue would substantially mitigate the burdens that this continuing doubt places upon legislatures, courts, and capital defendants, and that there are no countervailing reasons for the Court to postpone its resolution of this issue for a future Term. Pet. at 8-15. The Brief in Opposition does not effectively contest any of these points, but instead focuses primarily on an argument better devoted to a brief on the merits — that *Walton* was correctly decided and has not been undermined by *Apprendi*. While we disagree with that argument, we note that the Brief

in Opposition thus effectively concedes the Petition's central point — that this case presents issues of nationwide importance upon which this Court's guidance is urgently required.

1.b. Although portions of the Brief in Opposition briefly address matters related to the decision whether to grant or deny certiorari, the Brief in Opposition does not undermine the arguments presented on this question in the Petition, nor does it identify any valid concerns weighing against the grant of certiorari.

The Brief in Opposition points out, for example, that no conflict or "unsettled question" is present here. Br. in Opp. at 6. It is of course common ground, however, that no conflict or unsettled question may exist while *Walton* remains controlling authority. Pet. at 14-15. Similarly, the Brief in Opposition observes that this Court has not overruled *Walton*. Br. in Opp. at 6, 7, 10. Again, there is no contest on this point — if the Court had done so, there would be no need for petitioner to request that *Walton* be overruled now. The Brief in Opposition also attacks the notion that Arizona law has changed since *Walton* (Br. in Opp. at 9-10, 12), but the Petition did not assert that it had. Rather, the Petition noted that the decision here of the Arizona Supreme Court, which is the final expositor of Arizona law (*Brady v. Maryland*, 373 U.S. 83, 90 (1963)), *clarifies* that pursuant to that law, a judge does in fact "determine the existence of a factor which makes a crime a capital offense." *Apprendi*, 530 U.S. at 497 (internal quotation marks omitted).

The Brief in Opposition further asserts that this Court "expressly reaffirm[ed]" *Walton* in *Apprendi*. Br. in Opp. at 8. But the passage in question simply set forth an observation concerning this Court's holding in *Walton*, followed by the statement that that holding was "not controlling" with

reference to the non-capital hate-crime law before the Court. *Apprendi*, 530 U.S. at 496. The Brief in Opposition does not explain why these observations should be construed as an "express reaffirmance" of *Walton*'s holding. Finally, the Brief in Opposition argues that the Court should deny certiorari in light of the "broader consequences" that a decision on the question presented here would have in the non-capital context. Br. in Opp. at 12. This suggestion is perplexing, not only because an issue's broad significance is a reason to *grant* certiorari, Sup. Ct. R. 10, but also because the broader effects to which the State refers are already implicated by the *Apprendi* decision, which was made in the non-capital context. *See, e.g., United States v. Promise*, 255 F.3d 150, 156-67 (4th Cir.), *petition for cert. filed*, (U.S. Sep. 20, 2001) (No. 01-6398) (en banc) (citing cases).

2. The Brief in Opposition concedes (Br. in Opp. at 9) that Arizona's capital sentencing scheme is subject to the Sixth Amendment principles identified in *Apprendi*, wherein this Court held that "for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed" violates the defendant's Sixth Amendment right to a jury trial. *Apprendi*, 530 U.S. at 490 (internal quotation marks omitted). At the same time, the Brief in Opposition argues that a statutory sentence declaring that "[f]irst degree murder . . . is punishable by death or life imprisonment" (A.R.S. § 13-1105(C) (Pet. App. at 61a)) renders Arizona's capital sentencing scheme consistent with the Sixth Amendment mandate identified in *Apprendi*. *See* Br. in Opp. at 8-9. But this portion of Arizona's statutes simply has no effect upon the way in which capital sentencing is conducted in Arizona, and it certainly does not change the fact that Arizona's capital sentencing scheme "remove[s] from the jury the assessment of facts that increase the prescribed range of penalties" to

which a first degree murder defendant is exposed, to include the penalty of death. *Apprendi*, 530 U.S. at 490.[1]

The Brief in Opposition thus neither undermines the Petition's showing that this case presents an important issue as to which prompt resolution is appropriate, nor identifies any weakness in the Petition's argument on the merits of that issue.

CONCLUSION

For these reasons, and for the reasons articulated in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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1. The Brief in Opposition also stresses that "it is the *Eighth* — rather than the *Sixth* — Amendment that requires a finding of one or more statutory aggravating circumstances in order to impose a death sentence" (Br. in Opp. at 13), but it is unclear what relevance this observation has to the Petition. Petitioner does not allege that Arizona's capital sentencing statute lacks the necessary specification of aggravating circumstances, but rather that it authorizes a judge, rather than a jury, to the make the findings necessary to increase the available punishment from life imprisonment to death, and thus violates the Sixth Amendment mandate identified in *Apprendi*.